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# Economic Considerations: An Affirmative Action Proposal

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Symposium

Federal Marriage Amendment: Yes or No?

Economic Considerations: An Affirmative  
Action Proposal

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*Fides et Iustitia*

## COMMENT

### ECONOMIC CONSIDERATIONS: AN AFFIRMATIVE ACTION PROPOSAL

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In today's Information Age, higher education has come to play an increasingly important role in the creation of individual economic success.<sup>1</sup> The American economy, especially that of the inner city, is no longer generating jobs capable of supporting a family for workers with poor literacy and math skills.<sup>2</sup> Therefore, today's working poor have a more pressing need than ever for higher education as a tool for breaking the cycle of poverty.

Currently, however, higher education tends to preserve economic success in the hands of those who already possess it, rather than create a catalyst for under-privileged mobility.<sup>3</sup> Affirmative steps must be taken to open the doors of our colleges and universities, including those of our most elite institutions, to those deserving students most in need of the advantages of higher education. While standardized test scores and grades are fairly indicative of a high school graduate's likelihood of success in college, these snapshots do not paint a complete picture of any student's potential. In order to fully appreciate one's aptitude, it is necessary to take into account the unique obstacles that person has already overcome in attaining his or her current position. In modern American society, where "we have the most unequal distribution of income of any industrial nation in the world"<sup>4</sup> and where money can be exchanged for an uncountable

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1. Laura D'Andrea Tyson, *Needed: Affirmative Action for the Poor*, Bus. Week Online, [http://www.businessweek.com/magazine/content/03\\_27/b3840045\\_mz007.htm](http://www.businessweek.com/magazine/content/03_27/b3840045_mz007.htm) (July 7, 2003).

2. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 Tex. L. Rev. 1847, 1861-62 (June 1996).

3. See e.g. Natl. Ctr. for Educ. Statistics, Lutz Berkner & C. Dennis Carroll, *Access to Postsecondary Education for the 1992 High School Graduates*, <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=98105> (Oct. 9, 1997); Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* (The Cent. Found. Mar., 2003) (available at [http://www.tcf.org/Publications/Education/carnevale\\_rose.pdf](http://www.tcf.org/Publications/Education/carnevale_rose.pdf)).

4. Richard D. Kahlenberg, *The Remedy* 91 (Basic Books 1996) (quoting Labor Secretary Robert Reich).

legion of advantages (both educational and other), failure to take into account the economic disadvantage of the poor and working class is both inexcusable and an inaccurate system for the purpose of determining college admission.

The level of one's educational attainment, although historically a powerful indicator of an individual's potential economic success, has gained greater weight recently. In 1990, the average male high school graduate age 25 and older earned 68 percent of his counterpart with a bachelor's degree.<sup>5</sup> Just ten years later, that same high school graduate could expect to earn less than 61 percent of what his bachelor's degree-holding peer made.<sup>6</sup> This same trend is present for women, albeit at a slower pace. Additionally, and not surprisingly, these discrepancies in income become even more magnified as the educational gap between two individuals is widened, regardless of gender.<sup>7</sup>

Just as increasing one's level of education is a valuable tool for attaining economic success, the quality—or perceived quality—of that education can dramatically influence an individual's opportunities. Prospective students face substantial advantages if they are able to attend a selective college.<sup>8</sup> One such advantage is a greater likelihood of graduating. "Though intuitively one might think that graduation rates would fall for less-prepared students in rigorous academic programs, in fact those students graduate at higher rates than if they would if they had attended less-selective schools."<sup>9</sup> According to one extensive study, 86 percent of students who initially enrolled in a top-tier college graduated, while comparable rates fall to 71, 61, and 54 percent as one proceeds down the tiers of selectivity.<sup>10</sup> Naturally, one might suggest that the reason for the superior graduation rates of top-tier universities is directly tied to the caliber of students admitted. Even when adjusting for test scores, however, students who attend top-tier universities have a higher graduation rate than those attend-

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5. Natl. Ctr. for Educ. Statistics, *Digest of Education Statistics*, tbl. 381 (2002) (available at <http://nces.ed.gov/programs/digest/d02/dt381.asp>).

6. *Id.*

7. *Id.*

8. Richard D. Kahlenberg, *Economic Affirmative Action in College Admissions: A Progressive Alternative to Racial Preferences and Class Rank Admissions Plans 2* (The Cent. Found. Issue Br. Series, 2003) (available at <http://www.tcf.org/Publications/Education/kahlenberg-affaction.pdf>).

9. *Id.* at 6.

10. Carnevale & Rose, *supra* n. 3, at 12 (defining "top-tier" as the 146 most selective colleges).

ing a college of any other selectivity level.<sup>11</sup> Graduation, in turn, has a significant influence on the future earning power of students. In 2000, full-time workers who had attended some college but did not complete a degree earned 25 percent less than similarly situated individuals who held bachelor's degrees.<sup>12</sup>

A higher graduation rate is not the only advantage of attending a more selective university. Students attending more selective colleges are far more likely to pursue post-graduate education. In a comparison of equally qualified high school students, those who attend a more selective university experience higher rates of acceptance at graduate and professional schools.<sup>13</sup> "Among students scoring above 1200 on the SAT, 48 percent of those attending selective colleges go on to attend graduate school compared with 26 percent of those attending less competitive and noncompetitive schools."<sup>14</sup> While completing a bachelor's degree gives a graduate a substantial economic advantage over non-degree holders, the completion of a master's or professional degree creates enormous advantages.<sup>15</sup>

Based on these figures, it is obvious that educational achievement translates almost directly into increased economic status. Education is the most powerful tool for the intergenerational transmission of wealth as well as being an eradicator of the effects of intergenerational economic disadvantage.<sup>16</sup> As the level of parental education increases, so does income; with increased income comes greater investments of time and resources in the education of children, and thus, greater success in high school and a higher level of preparedness for college.<sup>17</sup>

This paper will begin by examining the shortcomings of our current system of racial affirmative action. While racial preferences have sparked some advancement for certain minority groups, those

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11. *Id.* at 13. "[A]mong students who score above 1200 on the SAT/ACT, 96 percent graduate from top-tier institutions, 86 percent graduate from second-tier colleges, and 75 percent graduate from third- and fourth-tier colleges. For those with an SAT-equivalent score between 1000 and 1100, 86 percent graduate from top-tier colleges, 83 percent from second-tier institutions, 71 percent from third-tier colleges, and only 67 percent graduate from the 429 fourth-tier colleges." *Id.*

12. Natl. Ctr. for Educ. Statistics, *supra* n. 5. Men who had attended some college but did not hold a degree earned, on average, \$40,337 compared to \$56,334 for those who completed a bachelor's degree. For women, the numbers are \$28,697 and \$40,415. *Id.*

13. Carnevale & Rose, *supra* n. 3, at 11.

14. Kahlenberg, *supra* n. 8, at 2.

15. See Natl. Ctr. for Educ. Statistics, *supra* n. 5.

16. Malamud, *supra* n. 2, at 1881.

17. Carnevale & Rose, *supra* n. 3, at 32-33.

improvements have neither been drastic enough nor sufficiently inclusive of those most in need of assistance.

The next section will introduce the theory of economic affirmative action. In examining this proposed system of preferences for the economically disadvantaged, this paper will lay out three reasons why affirmative action should incorporate an economic focus instead of a racial one: First, economic preferences are subject to a lower level of court scrutiny than racial classifications. Second, a color-blind affirmative action policy is more popular nationally than a racial policy. Third, if implemented correctly, economic affirmative action could foster even greater advancement for racial minorities, especially for those most in need, than the current race-based system.

The third section of this paper will address the implementation of an economic affirmative action policy. This section will examine the failings of a previous economic preference system and introduce a refined method of calculating economic disadvantage consisting of three elements: First, family income over a three-year period must be taken into account. Second, family wealth, or net worth, is a necessary consideration. Finally, the poverty density of an applicant's high school must be examined. These three criteria are both extremely influential to a student's likelihood of academic success as well as easily measured. Together, they provide an accurate measurement of the obstacles an individual has overcome in obtaining his or her current academic standing.

Finally, this paper will dispel the myth that racial classifications are an appropriate consideration for universities in their quest to achieve student diversity. Not only are racial preferences questionable on a constitutional level as a means of achieving such a goal, but they may also be less effective in assembling a diverse student body than a system of economic preferences.

#### A CALL FOR REPLACING RACIAL AFFIRMATIVE ACTION

"If college opportunities are restricted to those in higher income brackets, the way is open to the creation and perpetuation of a class society which has no place in the American way of life."<sup>18</sup> As harrowing as this admonition by President Truman's Commission on Higher Education seems, its mes-

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18. Kahlenberg, *supra* n. 8, at 9 (quoting President's Commn. on Higher Educ. vol. 2, 23 (1947)). The Commission on Higher Education, established by President Harry S. Truman in 1946, was a task force designed to garner public and political support for expanded access to and federal funding for higher education for all Americans. College of Education, University of Illinois at Urbana-Champaign, *The President's Commission Higher Education for Democracy*, <http://www.ed.uiuc.edu/courses/eol474/sp98/truman.html>.

sage still rings true almost 60 years later. Students from the highest economic quartile compose nearly three quarters of the enrollment at our nation's top-tier colleges.<sup>19</sup> Juxtaposed with the fact that only three percent of those seats are filled with students from the lowest economic quartile, it becomes clear that there is a class division in elite institutions for higher education.<sup>20</sup>

The disproportion of high-income students is not merely a top-tier phenomenon, but rather permeates four-year colleges nationally. There is a nearly perfect correlation between family income and the likelihood of a child pursuing a bachelor's degree.<sup>21</sup> While more than 54 percent of 18 to 24 year-olds from families earning at least \$75,000 per year are either full time students in a four-year college or are graduates with bachelor's degrees, their peers in families earning less than \$30,000 per year accomplish the same feat at a rate of 15 percent.<sup>22</sup>

Ignoring race, poor and working class students are actually worse off under the current college admission process than they would be if grades and test scores alone determined admission.<sup>23</sup> Under a purely "merit" based system, the bottom half of students, as measured by income, would represent 12 percent of the student body in top-tier colleges.<sup>24</sup> "Under the current system of race-based affirmative action, the bottom half actually does marginally worse than it would under the system of grades and test scores, dropping to a 9 percent representation."<sup>25</sup>

By upholding the constitutionality of a system whereby racial preferences are legitimate, the Supreme Court affirmed the power of government

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19. Kahlenberg, *supra* n. 8, at 5.

20. *Id.*

21. U.S. Census Bureau, School Enrollment—Social and Economic Characteristics of Students (Update): October 1998, *Enrollment Status of Primary Family Members 18 to 24 Years Old, by Family Income, Level of Enrollment, Type of School, Attendance Status, Gender, Race, and Hispanic Origin: October 1998* <http://www.census.gov/population/www/socdemo/school/p20-521dt.html>.

22. *Id.* The percentage of 18 to 24 year-olds who are full time students or graduates of four-year colleges by family income is as follows:

<i>Family Income</i>	<i>Full-time Student or Graduate</i>
Less than \$10,000	12.5%
\$10,000 - \$14,999	13.3%
\$15,000 - \$19,999	16.3%
\$20,000 - \$24,999	18.2%
\$25,000 - \$29,999	16.4%
\$30,000 - \$34,999	28.1%
\$35,000 - \$39,999	29.6%
\$40,000 - \$49,999	30.7%
\$50,000 - \$74,999	39.2%
\$75,000 and over	54.3%

23. Carnevale & Rose, *supra* n. 3, at 38.

24. *Id.*

25. Kahlenberg, *supra* n. 8, at n. 15.

"to act affirmatively to achieve equal opportunity for all."<sup>26</sup> Equal opportunity, although difficult to define, can be aptly described as the situation in which children born into families of different classes have the same chance of success.<sup>27</sup> In the setting of higher education, however, that equality has not been attained in either racial or economic terms. While African Americans constituted 15 percent of our nation's eighteen-year-olds in 1995 and Hispanics made up 13 percent of that group, they each comprised only six percent of the student body in top-tier colleges.<sup>28</sup> Even more glaring is the absence of poor students, regardless of race, as "[t]here are four times as many African American and Hispanic students as there are students from the lowest [socioeconomic] quartile."<sup>29</sup> Even among racial minorities, poor students are severely underrepresented. In a study of 28 selective universities performed by two former Ivy League university presidents—and affirmative action supporters—it was discovered that 86 percent of African American students fell into the middle class or better.<sup>30</sup>

Examination of these numbers raises one of the most common criticisms of racial affirmative action: it "currently benefits the most advantaged minority students disproportionately, and does little to help poor and working class students of color."<sup>31</sup> Critics of racial preferences suggest that those benefiting from affirmative action are minorities who have already risen from the lower classes.<sup>32</sup> Such accusations are not without merit, as even racial affirmative action supporters do not contest the fact that middle and upper-middle class minorities receive the greatest benefit from the program.<sup>33</sup>

Critics of racial affirmative action point not only to the fact that wealthy minorities benefit disproportionately from the system, but also to the fact that such benefits come at the expense of poor whites.<sup>34</sup> Even twenty-five years ago, research showed that 29 percent of working black men made more than the median white worker.<sup>35</sup> Applying racial prefer-

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26. *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978).

27. Kahlenberg, *supra* n. 4, at 83-91.

28. Carnevale & Rose, *supra* n. 3, at 10.

29. *Id.* at 11.

30. Kahlenberg, *supra* n. 8, at 3 (citing William Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 49 (Princeton U. Press 1998)).

31. *Id.*

32. Malamud, *supra* n. 2, at 1861.

33. "[T]he economic class breakdown of affirmative action beneficiaries is attributable primarily to systematic factors that favor the success of middle-income persons over lower-income persons generally." Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 *Fordham L. Rev.* 843, 882 (1997).

34. Kahlenberg, *supra* n. 4, at 49.

35. *Id.* at 45; James P. Smith & Finis R. Welch, *Closing the Gap: Forty Years of Economic Progress for Blacks* 10 (The Rand Corp. 1986). In 1980, 29 percent of black men had a higher income than the median white income, up from 22 percent in 1970 and 12 percent in 1960. *Id.* Obviously, this statistic reveals a discrepancy between the incomes of working black and white



ences, therefore, results in a more economically advantaged black person receiving a preference over a white person 29 percent of the time. This significant minority of occasions lends strength to the assertion that the application of racial affirmative action creates racial hostility.<sup>36</sup> When the most advantaged minorities are given a preference over the least advantaged whites, the net gain in equal opportunity is diminished, and working-class white Americans are pitted against racial minorities rather than the two groups uniting together in a common struggle.<sup>37</sup>

Critics of racial affirmative action also complain that it fails to take into account the reality that not all racial minorities have been equal victims of discrimination.<sup>38</sup> Affirmative action preferences should be narrowly tailored to provide actual victims with compensation.<sup>39</sup> One viable alternative may be to eliminate race-based preferences entirely and replace the current affirmative action scheme with a system based on economic status.<sup>40</sup> Economic preferences would provide compensation only to those members of society who feel the ongoing effects of discrimination in a measurable way—evident in their current level of economic disadvantage.<sup>41</sup>

#### ECONOMIC AFFIRMATIVE ACTION INTRODUCED

Economic affirmative action, if properly implemented, would produce far greater economic diversity in our nation's colleges, while preserving the improvements created by racial preferences over the past forty years.<sup>42</sup> The central idea behind economic affirmative action is to award a "plus" to college applicants from disadvantaged economic backgrounds based on familial economic status.<sup>43</sup> Equal opportunity is optimized under this scenario because economic factors that would otherwise inhibit a student's chance to develop his or her natural talents are offset by a quantifiable preference.<sup>44</sup> Individuals from disadvantaged socioeconomic backgrounds will receive a greater opportunity to achieve social mobility, and society will receive the benefit of reduced concentrations of poverty and increased equality.<sup>45</sup>

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Americans, as perfect equality would require 50 percent of black workers to make more than the median white worker. If, however, this gap has continued to narrow over the past 25 years, as it did in the previous 20, racial preferences function to displace an ever-growing number of low-income individuals who have a potentially greater need for assistance.

36. Kahlenberg, *supra* n. 4, at 65.

37. *See id.*

38. *Id.* at 19.

39. *Id.*

40. Don Munro, Student Author, *The Continuing Evolution of Affirmative Action Under Title VII: New Directions after the Civil Rights Act of 1991*, 81 Va. L. Rev. 565, 570 (1995).

41. Kahlenberg, *supra* n. 4, at 101-02.

42. *See Carnevale & Rose, supra* n. 3, at 5.

43. *Cf. Munro, supra* n. 40, at 602.

44. *See Kahlenberg, supra* n. 4, at 84.

45. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. Leg. Educ. 472, 475 (1997).

Numerous reasons exist for replacing racial affirmative action with an economically based policy. Among them are three issues of practicality: economic affirmative action policies would call for a lower level of court scrutiny; such a system is not only more popular among courts, but also in the public at large; and economic affirmative action, if correctly implemented, could preserve—if not improve upon—the quantifiable advancements racial affirmative action has attained for minorities while creating benefits hereto never experienced by the poor and working class.

#### COURT SCRUTINY

Under the Equal Protection Clause, courts apply a three-tiered system of constitutional scrutiny when reviewing government preferences—strict, intermediate, and rationality review.<sup>46</sup> While economic considerations are scrutinized under the least restrictive, rational basis standard, racial distinctions are subject to the most restrictive, strict scrutiny standard.<sup>47</sup> “In modern-era affirmative action jurisprudence, federal courts have disfavored race-conscious programs, not because they object to the goals of those programs, but because they find fault with the use of classifications based on race per se as the means to achieve those objectives.”<sup>48</sup>

Racial classifications, it is feared, place a stigma on affirmative action recipients as undeserving of selection based on their merits, thus promoting a perception of racial inferiority, as well as racial hostility.<sup>49</sup> As a result, racial classifications must be “narrowly tailored to further compelling government interests.”<sup>50</sup> If the government cannot demonstrate a truly compelling goal, or the means of accomplishing that goal are not so tightly fitted as to eliminate any possibility that the program was motivated by an illegitimate racial prejudice, racial classifications are necessarily unconstitutional due to the inherent “danger of stigmatic harm” that they possess.<sup>51</sup> So long as skin color is the focus of an affirmative action policy, race-consciousness and even racial prejudice is promoted and any significant advancement toward a “color-blind” society is unlikely.<sup>52</sup>

While racial classifications are often frowned upon, “[m]ost courts and commentators embrace some theory between pure equal opportunity and pure equal achievement” in order to obtain optimal justice.<sup>53</sup> A seemingly obvious proposal, therefore, is economic affirmative action. Classifications

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46. Malamud, *supra* n. 2, at 1860.

47. *Id.*

48. Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 Mich. J. Race & L. 1, 15 (Fall 2001).

49. See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas & Scalia, JJ., concurring in part and dissenting in part).

50. *Id.* at 326.

51. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

52. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228-29 (1995).

53. Munro, *supra* n. 40, at 580.

based on economic status, because they are subject to the lowest level of judicial scrutiny, are presumptively constitutional.<sup>54</sup> Legislatures are considered to be "constitutionally free" in terms of what economic legislation they pass due to the Court's lenient stance on the issue.<sup>55</sup> As a result, despite a strong historical correlation between economic status and race, the Court is likely to uphold an economic preference, absent intent to create a racial classification.<sup>56</sup>

#### PUBLIC POPULARITY

A system of economic affirmative action based on economic disadvantage is not an issue that garners only partisan support, but rather one that has national backing regardless of political identification, race, or social class. Even those vehemently opposed to racial preferences often concede that affirmative action is too deeply rooted in American society to be removed altogether.<sup>57</sup> While an overwhelming majority of Americans oppose racial preferences in college admission, as indicated by a number of recent polls, an almost inverse view is expressed when the public is asked to consider preferences for economic obstacles.<sup>58</sup>

This public support transcends race and class. "Majorities of both blacks and whites said they favored policies that give specific preferential treatment in college admissions and employment to people from poor families over those from middle-class or rich families."<sup>59</sup> Likewise, support for preferences given to low-income students in college admissions finds overwhelming support regardless of the family income of those individuals asked.<sup>60</sup> While 73 percent of survey respondents from families with an income of \$30,000 or less supported such a policy, a still robust 60 percent of those individuals from families earning \$50,000 or more would give an admissions advantage to low-income students.<sup>61</sup>

This trend also permeates both sides of the political spectrum. Refocusing affirmative action on economic grounds has found support among highly respected political players from both the left and right wings.<sup>62</sup> "Conservatives see the idea as a way of moving toward a color-

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54. Kahlenberg, *supra* n. 8, at 7.

55. Malamud, *supra* n. 2, at 1859.

56. Cf. *Bush v. Vera*, 517 U.S. 952 (1996).

57. Munro, *supra* n. 40, at 587.

58. Kahlenberg, *supra* n. 8, at 8. Public disfavor of racial preferences ranged from 56% to 68% depending on the source, while public support for preferences given to economically-disadvantaged students ranged from 57% to 65%. *Id.*

59. Sam Howe Verhovek, *In Poll, Americans Reject Means but not Ends of Racial Diversity*, N.Y. Times A1 (Dec. 14, 1997).

60. Carnevale & Rose, *supra* n. 3, at 30-31.

61. *Id.*

62. See Steven A. Holmes, *Mulling the Idea of Affirmative Action for Poor Whites*, N.Y. Times E3 (Aug. 18, 1991).

blind society whereas liberals perceive benefits in building a consensus on civil rights and in redistributing increased aid to the poor and working classes.”<sup>63</sup> A recent survey indicates that 72 percent of Democrats believe that at least some preference should be given in college admissions to low-income students, while 64 percent of Independents and 60 percent of Republicans support the same proposition.<sup>64</sup> Even the two most conservative justices on the Supreme Court, Antonin Scalia and Clarence Thomas, have endorsed the idea.<sup>65</sup>

Generally, Americans express the view that programs that help people to arrive at a place on the same “starting line” are favorable.<sup>66</sup> That starting line inevitably must refer to consideration for college admission, because the public considers “educational institutions [to] have the primary role among American institutions for promoting upward mobility.”<sup>67</sup> These preferential programs must also focus on economic disadvantage, as a greater number of Americans associate disadvantage with poverty than with race.<sup>68</sup> While people also consider a fair system to be one that honors “merit,” in combining college admissions with the public’s demand that economic disadvantage be considered, admissions should not merely be based on a student’s academic record, but also on the obstacles one had to overcome in order to achieve that standing.<sup>69</sup>

#### BENEFITS PRESENTED TO RACIAL MINORITIES

In advocating for a system based on economic preferences, one cannot say in good faith that racial affirmative action has been a complete failure in diversifying college admissions. Thomas Kane of UCLA estimates that at the top 20 percent of colleges where race is a factor in admissions, the average African American applicant receives a benefit equal to 400 SAT points or two-thirds of a grade point on a four-point scale.<sup>70</sup> As a result, racial preferences triple the number of African American and Latino students who would otherwise attend the nation’s top 146 universities under a system that takes into account only grades and test scores.<sup>71</sup>

Even racial affirmative action proponents must admit, however, that economic preferences, at worst, are the second-best alternative to racial

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63. Munro, *supra* n. 40, at 602.

64. Carnevale & Rose, *supra* n. 3, at 31.

65. Kahlenberg, *supra* n. 8, at 7.

66. Verhovek, *supra* n. 59, at A1.

67. Carnevale & Rose, *supra* n. 3, at 29.

68. *Id.* (indicating that 83% of those surveyed considered low-income status to be a disadvantage).

69. Kahlenberg, *supra* n. 8, at 3.

70. *Id.* at 2 (Thomas Kane holds a Ph.D. in Public Policy from Harvard University and is a Professor of Policy Studies and Economics at UCLA, where he has studied the impact of affirmative action on college admissions.).

71. *Id.*

preferences for minority students and are certainly a superior option to ending affirmative action entirely.<sup>72</sup> At their best, economic preferences would indirectly compensate for past racial discrimination, disproportionately benefit minorities, and provide greater racial integration than that achieved even under the current system.<sup>73</sup>

By employing an economic focus, affirmative action would actually compensate those racial minorities who have been the greatest victims of past discrimination better than the existing system, which disproportionately benefits middle class minorities.<sup>74</sup> Black families suffer from poverty at a drastically higher rate than white families.<sup>75</sup> This is not for lack of effort, however. In 1990, black households with a member employed full-time for fifty or more weeks of the year were still more than three times as likely to be impoverished as similarly situated white households.<sup>76</sup> By instituting a preference system based on poverty status alone, nearly one-third of the beneficiaries would be African American.<sup>77</sup>

Under a system that lends assistance based on wealth and school poverty density, minority applicants would continue to benefit disproportionately, even when compared to white applicants of the same economic class. While the black median income is only 60 percent of median white earnings, black wealth is an abysmal nine percent of white wealth.<sup>78</sup> By giving a "plus" to college applicants from low-wealth families, the effects of racial housing discrimination and other causes of disparity in wealth will be directly combated by compensating those against whom discrimination has taken the deepest, and most tangible, toll.<sup>79</sup>

Likewise, by recognizing the burden placed on students who attend schools with a high poverty density and remunerating them for that burden, racial minorities will be disproportionately assisted. The same housing discrimination that has prevented minorities from accumulating a comparable wealth to their white counterparts also tends to concentrate minorities in low-income neighborhoods.<sup>80</sup> Poor African Americans are six times more likely to live in a densely impoverished community than poor whites.<sup>81</sup> Appallingly, three-quarters of the population of our nation's most impover-

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72. Munro, *supra* n. 40, at 570.

73. Kahlenberg, *supra* n. 4, at 105.

74. *Id.* at 104.

75. Munro, *supra* n. 40, at 604 (indicating that in 1990, 31.9% of blacks fell below the poverty line, as compared to 10.7% of whites).

76. *Id.* (stating that in 1990, 9.6% of black households with a full-time worker fell below the poverty line compared with 2.9% for whites).

77. *Id.* at 605.

78. Kahlenberg, *supra* n. 4, at 168.

79. See Roithmayr, *supra* n. 48, at 11.

80. Sander, *supra* n. 45, at 495.

81. Kahlenberg, *supra* n. 4, at 170.

ished neighborhoods are comprised of racial and ethnic minorities.<sup>82</sup> Inevitably, with minority concentration in poor neighborhoods comes a disproportionate number of minorities in our nation's poorest schools. While whites comprise 84 percent of the student body at schools with the fewest students receiving subsidized lunches, blacks compose only six percent and Hispanics five percent of those same schools.<sup>83</sup>

Finally, in addition to the disproportionate benefit that an economic preference system would give to minorities, an unquantifiable drawback of racial affirmative action would be eliminated. By focusing on economic disadvantage, the "stigma" attached to racial preferences would no longer be a factor.<sup>84</sup> Any public perception that racial minorities have diminished abilities would no longer attach itself to affirmative action, as beneficiaries would be individuals who actually "possess backgrounds of economic deprivation," rather than ones who obtain a preference based solely on the color of their skin.<sup>85</sup> One's economic status, unlike his or her race, is not an immutable characteristic. In most instances, it is easy to visually discern that an individual is a member of a protected racial class, and therefore a likely beneficiary of affirmative action. However, while superficial indicia do exist as to an individual's socioeconomic background, one student can never be sure of another's socioeconomic level, making the stigma of poverty much less likely to attach itself than the stigma of race. Economic affirmative action, therefore, would preserve the current benefits under a racial preference system by disproportionately benefiting minorities, while eliminating the major criticisms of the current system.<sup>86</sup>

#### INSTITUTING ECONOMIC AFFIRMATIVE ACTION

The purpose of economic affirmative action, then, is not just to achieve indirectly "the same result" as racial affirmative action, by covert means. The policy would provide a similar degree of overall racial diversity, but it would benefit a quite different group of African Americans and Latinos, high achievers who overcame economic deprivation—as well as a whole new cohort of working-class whites and Asians—all of whom deserve a place at the table of higher education that has hitherto been denied them.<sup>87</sup>

The most widely known implementation of affirmative action based on economic need succeeded in only half of what Richard Kahlenberg cor-

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82. John A. Powell, *Socioeconomic School Integration – A Response*, [http://www.prrac.org/full\\_text.php?text\\_id=738&item\\_id=7780&newsletter\\_id=59&header=Search%20Results](http://www.prrac.org/full_text.php?text_id=738&item_id=7780&newsletter_id=59&header=Search%20Results) (Nov.-Dec. 2001).

83. Carnevale & Rose, *supra* n. 3, at 36-37.

84. Munro, *supra* n. 40, at 608.

85. *Id.*

86. *See id.*; *see also* Kahlenberg, *supra* n. 4.

87. Kahlenberg, *supra* n. 8, at 5.

rectly described above as the purposes of economic affirmative action. In 1997, following the implementation of California's Proposition 209, eliminating the state's ability to employ a system of racial preferences, the UCLA School of Law incorporated an extensive class-based preference program in an attempt to preserve diversity.<sup>88</sup>

The program's success story is that it dramatically increased the socioeconomic diversity of the student body. The UCLA School of Law experienced a four-fold increase in the percentage of students from poor families, and "the proportion of students from low-income neighborhoods probably tripled."<sup>89</sup> Along with this achievement, however, came a degree of failure. Under the new system, Latino admissions fell 26 percent and black admissions declined by 72 percent from their historic averages.<sup>90</sup>

Although UCLA's progress in creating greater economic diversity is admirable, the program's effects on minority admissions are startling. Despite the cause for concern, however, there are valid explanations for why minority admissions were so negatively affected, and similar results are preventable. The first, and simplest, explanation for at least part of the drop-off is the fact that minority applications fell sharply in 1997. African American students applied to UCLA at a 28 percent lower rate, and Latino applications were down 21 percent.<sup>91</sup> UCLA was in the precarious position of being one of only three top-twenty institutions prevented from offering a race-based preference.<sup>92</sup> It stands to reason that if no public institution could offer race-based preferences, minority application rates would return to normal for a school like UCLA, eliminating some of the negative results experienced by their class-based program.

A second explanation for UCLA's loss of minority admitees is that, while minority groups benefited disproportionately from UCLA's class-based system, the preference given under the new system was dramatically smaller than that available under the old racial affirmative action policy.<sup>93</sup> One of the cornerstones of an economic affirmative action plan is that the more disadvantaged an individual is, the more preference that student should receive in order to "level the playing field." However, the UCLA system placed a floor on academic performance—which they called their predictive index, or PI. If a student's PI—which is composed of the individual's LSAT score and undergraduate grades, adjusted for the strength and degree of grade inflation of the undergraduate institution<sup>94</sup>—fell below 625, that student could not be admitted, regardless of his or her level of

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88. Sander, *supra* n. 45.

89. *Id.* at 473.

90. *Id.* at 497-98.

91. *Id.* at 492.

92. *Id.*

93. *Id.* at 497-98.

94. *Id.* at 479.

economic disadvantage.<sup>95</sup> Such a policy, as administered by UCLA, undermines the philosophy behind, and potential success of, economic affirmative action. Under a racial preference program, UCLA had "often admitted blacks with PIs as low as 550 and sometimes lower."<sup>96</sup>

Irrefutable statistical evidence indicates that academic success is directly correlated with familial economic status, and that racial minorities are the most economically disadvantaged segment of our nation's population.<sup>97</sup> Therefore, by raising its minimum academic requirements by 14 percent, or more, at the same time it went to a class-based system, UCLA disproportionately reduced the prospects of minority students, who are more economically disadvantaged and, therefore, likely have lower academic qualifications.<sup>98</sup> The nexus of economic affirmative action rests on the premise that the more economically deprived an individual is, the greater the preference that student will receive. By setting, and in fact raising, a minimum academic requirement, economic affirmative action will fail to compensate those upon whom economic deprivation has taken its greatest toll.

A final explanation for the UCLA system's failure in admitting minority applicants is the fact that familial wealth was not included in the preference.<sup>99</sup> By not giving a boost for low family wealth, minorities, and especially blacks, were disproportionately affected, as "[i]t is well known that African-American families have markedly less wealth than white families of the same income level."<sup>100</sup>

The UCLA system should be seen as a ray of hope, not an albatross, for economic affirmative action supporters. Its dramatic increase in creating socioeconomic diversity among the student body speaks for itself, and with a few minor adjustments, its failings in sustaining racial diversity are curable. The considerations in improving the system, however, are numerous. Kahlenberg suggests that the ideal definition of economic disadvantage requires an examination of seven obstacles: (1) parental income, (2) parental occupation, (3) parental education, (4) the presence or absence of two parents, (5) familial wealth, (6) neighborhood poverty concentrations, and (7) school poverty concentration.<sup>101</sup> While each of these considerations may be salient on some level, each one is not purely economic in nature, nor easily quantifiable. Parental occupation, for instance, is difficult to quantify, especially when put in the context of trying to compare a low-level white-collar position with a skilled blue-collar one. Additionally, pro-

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95. *Id.* at 484.

96. *Id.* at 497.

97. See Munro, *supra* n. 40; Kahlenberg, *supra* n. 4; Deborah C. Malamud, *Affirmative Action, Diversity and the Middle Class*, 68 U. Colo. L. Rev. 939 (1997).

98. Deborah C. Malamud, *A Response to Professor Sander*, 47 J. Legal Educ. 504, 505-06 (1997).

99. Sander, *supra* n. 45, at 485-86.

100. Malamud, *supra* n. 98, at 507.

101. Kahlenberg, *supra* n. 8, at 2-3.



viding a preference to a child from a wealthy single-parent household, who has received all of the advantages of that wealth, at the expense of an applicant from an impoverished, but intact two-parent household is counterintuitive to the premise of economic affirmative action. Finally, the consideration of both neighborhood and school poverty density may provide an inappropriate double boost for one applicant at the expense of another well-deserving one. In deciding which, and how many, factors should be applied to an economic preference system, it is critical to recognize that as the definition of socioeconomic-disadvantage is broadened, the less inclusive of racial minorities it becomes.<sup>102</sup> Additionally, as Kahlenberg concedes, "a properly constructed economic preference program examines quantifiable information that is already provided by applicants seeking financial aid and can be readily verified."<sup>103</sup>

A successful economic affirmative action policy should strive to maintain, or even expand upon, racial diversity while increasing economic diversity by appropriately compensating college applicants for the quantifiable obstacles they have overcome. At the same time, efficiency requires that the system be inexpensively employed and easily verifiable. In order to achieve each of these requirements, economic affirmative action calls for the incorporation of three elements in order to attain true equal opportunity in college admissions: average family income over the past three years, family wealth, and the poverty density of the school attended.

#### INCOME

The most straightforward measure of economic disadvantage is income.<sup>104</sup> The simplicity of income does not end in its measurement, however, but is also plainly evident in its effect on the chances of a young person obtaining a college education. As the income disparity between rich and poor grows, "there are signs that the relationship between income and college graduation is becoming stronger."<sup>105</sup>

Eighty-six percent of 1992 high school graduates from families with incomes of \$75,000 or more had at least minimal academic qualifications for admission to a four-year college.<sup>106</sup> However, only 68 percent of middle-income families (\$25,000–74,999) and 53 percent of low-income families (less than \$25,000) produced students with minimal qualifications.<sup>107</sup> The correlation between income and academic achievement is nowhere

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102. Sander, *supra* n. 45, at 502.

103. Kahlenberg, *supra* n. 8, at 8.

104. See Malamud, *supra* n. 2, at 1878.

105. Tyson, *supra* n. 1.

106. Natl. Ctr. for Educ. Statistics, Lutz Berkner & C. Dennis Carroll, *Access to Postsecondary Education for the 1992 High School Graduates* 29, <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=98105> (Oct. 9, 1997).

107. *Id.*

more apparent than in national SAT results. Without exception, as family income rises, so do the SAT scores of a child from that family.<sup>108</sup>

While it is clear that income has a tangible effect on academic success and is a necessary component of any economic affirmative action policy, a more difficult decision involves determining how to measure income. "Accurate income measurement depends upon people's economic horizons, including their foresight, credit constraints, and planning abilities."<sup>109</sup> A family's past and future income plays a significant role in the current consumption habits of that household.<sup>110</sup> Therefore, a sophisticated analysis of economic well-being requires not just a snapshot of a household's income, but rather a longer view of their economic circumstances.<sup>111</sup>

The need to consider a longer time frame when examining income is a more pressing consideration for low-income families than for others. While volatility of earnings has historically been on the rise for all income levels, low-income families experience a greater fluctuation in their income levels than middle and upper-income families.<sup>112</sup> Not only are their levels of income volatility greater, but so too is the effect of any income volatility on low-income families. Low-income households must often incur high interest rate debt in order to survive lean years and have less means to save in order to offset future fluctuations.<sup>113</sup> By looking at only one year's income, the family that has historically earned \$20,000, but has the fortuity of earning \$30,000 during the year that their child applies to college, has its income grossly overstated.

While a snapshot measurement of income is not fair to low-income families with volatile incomes, one need not examine too long of a period in order to develop an accurate measurement. "Three quarters of income volatility is gone after one year and nearly all after three to four years."<sup>114</sup> Therefore, even though the longest period possible provides the best repre-

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108. Kahlenberg, *supra* n. 4, at 99. In 1994, the corresponding average SAT scores for individuals based on family income were:

<i>Family Income</i>	<i>SAT Score</i>
Less than \$10,000	766
\$10,000 - 20,000	812
\$20,000 - 30,000	856
\$30,000 - 40,000	885
\$40,000 - 50,000	911
\$50,000 - 60,000	929
\$60,000 - 70,000	948
\$70,000 or more	1000

109. Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 Harv. J. on Legis. 395, 401 (Summer 2003).

110. *Id.* at 402.

111. Malamud, *supra* n. 2, at 1869.

112. Batchelder, *supra* n. 109, at 397.

113. *Id.* at 403.

114. *Id.* at 423.

sentation of a family's true economic status, most of the inherent inaccuracies of annual income measurement can be addressed by simply using a two or three-year averaging.<sup>115</sup>

### WEALTH

While income averaging provides a more sophisticated depiction of economic inequality than a mere snapshot of current income, it, alone, does not complete an economic analysis for affirmative action purposes. Wealth measures the extent to which income or debt has accumulated in a family over generations, thus capturing the full degree of disadvantage or discrimination felt by a family over time.<sup>116</sup>

Wealth, like income, impacts life chances tremendously.<sup>117</sup> High net worth relieves a household of its total dependency on income generated by occupation, and that economic freedom cushions it from market forces.<sup>118</sup> Income volatility is also less detrimental to the wealthy family, as it can absorb the pressures of lean years through liquidating its wealth rather than being forced to rely on high interest debt to sustain its position.<sup>119</sup>

Wealth is distributed even more unequally than income in the United States, with the top ten percent of Americans owning two-thirds of the nation's net worth.<sup>120</sup> Current economic and tax policies further assist this trend, as homeowners are rewarded with federal income tax deductions for local property tax payments and mortgage interest payments, and the realized benefits from those deductions increase with the income level of the taxpayer.<sup>121</sup> Additionally, wealthier households capable of buying more expensive homes and homes that appreciate at a greater rate receive a more exaggerated benefit when they sell their personal residence and pocket the gain on that sale, tax free.<sup>122</sup> Therefore, not only do households with greater wealth experience greater immediate economic stability, but current economic policy enables such families to maintain their net worth, thus creating intergenerational stagnation in the distribution of wealth.

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115. *Id.*

116. Kahlenberg, *supra* n. 8, at 4.

117. Malamud, *supra* n. 2, at 1871.

118. *Id.* at 1871-72.

119. Batchelder, *supra* n. 109, at 401-03.

120. Kahlenberg, *supra* n. 4, at 92; Malamud, *supra* n. 2, at 1871.

121. Richard Rothstein, *How Tax Code Worsens Education Gap*, N.Y. Times B8 (Apr. 25, 2001). Assuming that both households itemize their deductions (which is less likely for families with lower incomes) and both pay \$10,000 in mortgage interest in a year, a married couple earning \$350,000 would receive an income tax savings of \$3,500 ( $\$10,000 \times 0.35$ ), while a married couple earning \$30,000 would receive a savings of \$1,500 ( $\$10,000 \times 0.15$ ) even though they paid just as much interest. See 26 C.F.R. § 1.163 (2004).

122. 26 C.F.R. § 1.121 (2004) (excluding from taxation gains on the sale of a personal residence up to \$500,000).

Because “wealth barriers” remain “strongly resistant to intergenerational mobility”<sup>123</sup> and wealth is perhaps the most powerful tool for the economic stability of a family, those households with a low net worth face a greater dependence on their annual income in order to sustain economic life. A lack of wealth is a major destabilizer. When compounded by income volatility, it greatly restricts the opportunity for economic mobility for those who lack the freedom to take economic risks.<sup>124</sup> Additionally, families that lack wealth experience an impaired ability to plan for the future due to a constant fear of changing market forces.<sup>125</sup> The exclusion of the consideration of wealth from an examination of economic disadvantage is, therefore, an inaccurate means of establishing a system promoting equal opportunity.

#### POVERTY DENSITY

While focusing strictly on a household’s economic status can provide substantial understanding into the level of one’s relative disadvantage, failure to look beyond the walls of one’s home hinders the development of a complete understanding of the way economics influence a student’s education. Like familial economic status, the economic well-being of one’s school population plays a substantial role in determining that student’s likelihood of academic success.<sup>126</sup>

“[S]tudents who attend schools that serve large numbers of low-income students consistently perform worse on achievement tests than students who attend schools that serve wealthier students.”<sup>127</sup> In fact, a student is twice as likely to fall into the bottom quartile of economic achievement if he or she attended a high-poverty school compared to a student at a low-poverty school.<sup>128</sup> While, naturally, many students attending schools with a high poverty density are themselves economically disadvantaged, individual economic status does not fully explain the cause of these lower scores. When economically disadvantaged students are removed from densely impoverished schools and placed in schools attended by more affluent students, their academic performance improves.<sup>129</sup> In fact, the poverty density of one’s school may have an even greater impact on a student’s academic performance than that student’s individual level of economic disadvantage. When middle-class students are placed in high-poverty schools, they are more likely to be underachievers than a poor student attending a

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123. Malamud, *supra* n. 2, at 1871.

124. *See id.*

125. *See id.*

126. Richard D. Kahlenberg, *All Together Now* 25-27 (Brookings Instn. Press 2001).

127. Peter Zamora, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 Geo. J. on Pov. L. & Policy 413, 414 (Summer 2003).

128. Kahlenberg, *supra* n. 126, at 26.

129. Zamora, *supra* n. 127, at 414.

middle-class school.<sup>130</sup> Interestingly, middle and upper-income students do not experience a decrease in academic performance if at least 50 percent of the school population remains middle-class.<sup>131</sup>

Explanations abound for why academic achievement bears a nearly inverse relationship with school poverty rates.<sup>132</sup> One possibility points to the disparate funding allotted to schools based on a system of financing public schools with funds raised through state and local taxes—often property taxes.<sup>133</sup> Even in the landmark case upholding the rights of states to fund schools by means of local property taxes, the Supreme Court admitted that “reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others.”<sup>134</sup> Whatever the precise reason for low academic achievement in schools with impoverished student bodies, “the conditions of poverty or economic deprivation produce an environment which in too many cases precludes children from taking advantage of the educational facilities provided.”<sup>135</sup>

While the exact reason for the phenomenon is unknown, the fact remains that a student’s likelihood of academic success appears to have a powerful correlation to the economic and educational backgrounds of his or her classmates.<sup>136</sup> These trends are unmistakable, and until the poverty density of a school does not bear an inverse relationship with the academic productivity of its student body, a school’s high density of poverty must be considered an obstacle deserving of preference in college admissions in order for equal opportunity to be achieved.<sup>137</sup>

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130. Kahlenberg, *supra* n. 126, at 27 (indicating that 37% of middle class students attending high-poverty schools are likely to underachieve, compared to 28% of poor students attending middle class schools).

131. *Id.* at 110-11.

132. See Zamora, *supra* n. 127.

133. Ted Halstead, *Rich School, Poor School*, N.Y. Times A19 (Jan. 8, 2002).

134. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

135. Zamora, *supra* n. 127, at 419.

136. Kahlenberg, *supra* n. 126, at 25. Students from economically deprived backgrounds do better in schools with high-income populations, and higher income students tend to perform worse in low-income schools. Carnevale & Rose, *supra* n. 3, at 35; Kahlenberg, *supra* n. 126 at 26-27.

137. While no national agency exists for the collection of data measuring the socioeconomic makeup of schools to the same degree that the census collects data on communities, the use of school poverty density is still a viable candidate for inclusion in an economic affirmative action program. Sander, *supra* n. 45, at 482. The Free and Reduced-Price Meals Program (FARM) provides free school lunch to students whose families live at or below 130% of the poverty line. Kahlenberg, *supra* n. 126, at 106. The program also provides reduced-price assistance to students whose families live at or below 185% of the poverty line. *Id.* These numbers are readily available and provide an accurate measure of a school’s proportion of economic disadvantage.

One study employing a subsidized lunch focus discovered “an inverse relationship between the percentage of students receiving subsidized lunches in high schools and the percentage of their students who took college entrance exams.” Carnevale & Rose, *supra* n. 3, at 35. Accordingly, 64% of students took a college entrance exam at schools where no more than 10% of the student body received subsidized lunches (high-income schools). *Id.* At the other end of the spectrum, only 37% of students attending schools where more than 30% of the student body received meal

## IMPLEMENTATION

Once the criteria for an economic affirmative action program are decided, the central idea is to award a "plus" based on the relative disadvantage of each college applicant in comparison to that institution's applicant pool for the given year.<sup>138</sup> Applied correctly, economic affirmative action could be as non-controversial in nature as current need-based scholarship programs.<sup>139</sup>

In order to determine which applicant is eligible for a preference, the college should employ a gradational method, whereby each applicant would fall into a "continuous sliding scale of relative economic position"<sup>140</sup> based on each of the three criteria: family income, wealth, and poverty density of the high school attended. The gradational approach is a simple method whereby colleges can easily compare the economic positions of the applicants and assign an economic rank for each individual criterion.<sup>141</sup> Colleges would then award applicants a sliding scale preference for each category in which they qualify as disadvantaged. The most disadvantaged applicant under each criterion would receive the largest preference. Each subsequent—or less-disadvantaged—student would then receive a smaller "plus" until the level of disadvantage reached some pre-ordained cut-off point. Applicants falling beyond the cut-off point would receive no preference. This method would account for each element of deprivation separately, allowing a student to qualify for one preference even in the absence of the other two. Naturally, colleges may not flawlessly institute the level of preference to award for each criterion of disadvantage, as well as the cut-off points at which schools will no longer award preferences, on the first try. Nevertheless, with an educated appraisal and some cautious trial and error, economic affirmative action is a viable, permanent alternative to our current race-based system in college admissions.

## THE DIVERSITY RATIONALE

While arguments abound in support of the superiority of economic affirmative action as a permanent tool for creating equal opportunity, one justification for the use of racial classifications must still be addressed: the diversity rationale. In the development of affirmative action jurisprudence, the Supreme Court has identified "two cognizable governmental interests

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subsidies (low-income schools) took similar entrance exams. *Id.* Likewise, more than twice as many students per capita scored an SAT-equivalent of 1000 at high-income schools as those at low-income schools. *Id.* It is not surprising, therefore, that low-income students attending high-income schools attend universities in the top two tiers of selectivity at twice the rate as low-income students in high schools filled with their economic peers. *Id.* at 35-36.

138. *Cf. Munro, supra* n. 40, at 602.

139. *Id.* at 609.

140. Malamud, *supra* n. 2, at 1863-64.

141. *Id.* at 1865.

sufficient to justify race-conscious programs: remedying the effects of past discrimination and fostering diversity.”<sup>142</sup> I have already demonstrated that economic affirmative action is an effective tool for remedying past discrimination because it provides a “plus” to those college applicants who currently feel the palpable effects of discrimination, evident in their economic disadvantage. Additionally, economic affirmative action may be a superior tool for fostering diversity.

The diversity rationale is premised upon the theory that the presence of students with diverse backgrounds “enhance[s] classroom discussion and the educational experience both inside and outside the classroom.”<sup>143</sup> In the recent landmark University of Michigan Law School case, the University posited the argument that a meaningful representation of groups that have been the historic victims of discrimination yields educational benefits through the introduction of diverse perspectives.<sup>144</sup> The Court accepted the argument and ultimately allowed racial minority group membership to be the subject of consideration in a university’s conscious pursuit of diversity, requiring simply that such a program “must further the goal of enriching the educational environment.”<sup>145</sup>

The use of a diversity rationale in support of racial classifications came into being in Justice Powell’s opinion in *Regents of U. of Cal. v. Bakke*,<sup>146</sup> in 1978.<sup>147</sup> In *Bakke*, Powell approved the use of racial classifications for one purpose only: “the attainment of a diverse student body.”<sup>148</sup> Because Powell’s opinion—providing the crucial fifth vote necessary to permit “some uses of race in university admissions”<sup>149</sup> in the future—centered on grounds that differed from the other four justices, it was not until the recent *Grutter v. Bollinger* decision that the Supreme Court “finally put to rest the uncertainty surrounding the legal status of affirmative action in higher education.”<sup>150</sup> In so doing, *Grutter* held that “fostering student-body diversity is a compelling state interest sufficient to justify the use of race as a factor in admissions decisions.”<sup>151</sup>

The proposition that “tradition and experience” reveal the substantial benefit to be received from a diverse student body is nearly incontrovertible.<sup>152</sup> Expert studies aptly demonstrate that student exposure to diverse

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142. Garrick B. Pursley, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 Tex. L. Rev. 153, 159 (2003).

143. *Grutter*, 539 U.S. at 319.

144. *Id.*; Brian T. Fitzpatrick, *The Diversity Lie*, 27 Harv. J.L. & Pub. Policy 385, 387 (Fall 2003).

145. Pursley, *supra* n. 142, at 189.

146. *Bakke*, 438 U.S. at 265.

147. Fitzpatrick, *supra* n. 144, at 396.

148. *Bakke*, 438 U.S. at 311.

149. *Id.* at 326.

150. Pursley, *supra* n. 142, at 153.

151. *Id.*

152. *Grutter*, 539 U.S. at 324.

viewpoints is essential in order to prepare an individual for success in our modern global marketplace.<sup>153</sup> What is less clear, however, is whether racial classifications are the optimal tool for pursuing this diversity. While it is difficult to contest the fact that the government has a compelling interest in promoting diversity in our nation's universities, preferences based on race for the purpose of fostering diversity stand on constitutionally shaky legs when juxtaposed with a system of economic preferences for two reasons.

The first of these reasons implicates the "narrowly tailored" requirement of strict scrutiny. In a 1989 opinion that lacks any mention of the diversity rationale, the Supreme Court cautioned: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for *remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>154</sup> Again, even in its ruling that the diversity rationale makes racial considerations constitutionally legitimate, the Court repeated its previous admonition that the "means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."<sup>155</sup> This requirement of narrow tailoring necessitates the consideration of race-neutral alternatives that could be workable in achieving a university's desired diversity.<sup>156</sup> In making this demand, some members of the Court have even gone so far as to require that racial classifications must fit a university's desire to foster a diverse student body "with greater precision than any alternative means."<sup>157</sup>

The application of strict scrutiny to racial classifications, alone, is a powerful arrow in the quiver of economic affirmative action supporters. Proper economic classifications are not only a "workable" alternative to racial classifications, but may actually accomplish the goal of diversity with greater precision. Whether one supports racial preferences or not, the presence of economic classification as a viable affirmative action alternative certainly casts an ominous shadow of doubt on whether the current system of race-based preferences appropriately meets the requirement of narrow tailoring.

The second constitutional argument in direct opposition to racial classifications as a means of creating diversity entails duration. The Supreme Court recognizes that "race-conscious admissions policies must be limited in time."<sup>158</sup> In accordance with this requirement, therefore, universities that choose to employ racial preference admissions programs recognize that

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153. *Id.* at 330.

154. *J.A. Croson Co.*, 488 U.S. at 493 (emphasis added).

155. *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

156. *Id.* at 339-40.

157. *Id.* at 379 (Rehnquist, C.J., Scalia, Kennedy, & Thomas, JJ., dissenting) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986)).

158. *Id.* at 342.



“there is an implicit collateral assumption that fostering diversity through affirmative action is a project that will one day be satisfactorily completed.”<sup>159</sup> While racial affirmative action supporters can have limited success defending their system of preference against the duration argument when promoting affirmative action as a remedial program—assuming these defenders assert that one day the discrimination that gave rise to the need for affirmative action will be extinguished, and thus affirmative action is the proper remedy—the goal of fostering academic diversity is ongoing. As long as different viewpoints exist in society, universities will have an interest in fostering the expression of those viewpoints on their campuses.<sup>160</sup> In other words, “an interest in academic diversity does not have a self-contained stopping point.”<sup>161</sup> Therefore, diversity exists independent of race,<sup>162</sup> and, as diversity will always exist, racial preferences are an unconstitutional means of its promotion, especially in light of the existence of an economic alternative.

In addition to the constitutional arguments that lend favor to a system of economic preferences, the actual goal of fostering diversity may find superior results under a system of economic affirmative action. Even the University of Michigan Law School policy that gave rise to the most recent Supreme Court defense of racial classifications as a means of fostering diversity recognizes that “there are many possible bases for diversity admissions.”<sup>163</sup> Likewise, in his opinion that first introduced the diversity rationale, Justice Powell was clear in stating that race was not the only characteristic, but merely one factor among many that should be considered in a university’s attempt to create a diverse student body.<sup>164</sup> In so doing, Justice Powell went on to commend Harvard College’s concept of diversity that also included students from disadvantaged economic backgrounds.<sup>165</sup>

If the goal behind the diversity rationale truly is to enhance the learning environment of a university by introducing students to a multitude of viewpoints,<sup>166</sup> then the use of racial classifications in order to achieve that goal is simply underinclusive. If, however, Yale Law School Professor Peter Schuck’s observation is correct, and “diversity is merely the current rationale of convenience for a policy that [affirmative action’s defenders would] prefer to justify on other grounds . . . [and] the heart of the case for affirmative action is unquestionably its capacity to remedy the current effects of past discrimination,”<sup>167</sup> then the current system transcends the clas-

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159. Pursley, *supra* n. 142, at 192.

160. See *Grutter*, 539 U.S. at 306.

161. Pursley, *supra* n. 142, at 198.

162. *Id.*

163. *Grutter*, 539 U.S. at 338.

164. *Bakke*, 438 U.S. at 315.

165. *Id.* at 322.

166. *Grutter*, 539 U.S. at 313-25.

167. Fitzpatrick, *supra* n. 147, at 395.

sification of underinclusivity and borders on the realm of unconstitutionality. An examination through the lens of strict scrutiny reveals that racial preferences should be replaced by a system of economic preferences because racial affirmative action is neither a better fit than economic affirmative action for creating diversity, nor can it withstand the requirement that a race-conscious program be temporary in duration.

The current system of racial preferences provides assistance to members of only a few groups, and the beneficiaries are predominantly from the same economic class.<sup>168</sup> Providing preferences to economically disadvantaged applicants, on the other hand, would not only preserve racial diversity in our nation's universities, but it would also drastically diversify the socioeconomic makeup of those campuses. Racial minorities who have been the historic victims of discrimination would retain their representation, and poor and middle class students would receive a substantial voice for the first time.

#### CONCLUSION

"The purpose of economic affirmative action, then, is not just to achieve indirectly 'the same result' as racial affirmative action, by covert means."<sup>169</sup> Rather, if implemented correctly, economic affirmative action could create true equal opportunity for all Americans, regardless of race. Racial minorities, as a group, will benefit disproportionately due to their lower incomes, substantially inferior wealth, and higher demographic concentration in low-income schools. At the same time, the most disadvantaged minorities will receive the largest preference, benefiting those individuals who have suffered the most from past discrimination.

Not only will racial diversity be preserved, but socioeconomic diversity will also skyrocket. Working class whites and Asians, who currently are deprived of the benefit of affirmative action policies, will be compensated for the obstacles they, too, have overcome. This, in turn, will reduce the racial tension spawned by affirmative action's current focus on race because, even though African Americans and Latinos should continue to benefit disproportionately, the justification behind any individual receiving a preference will be irrefutable.

Equal opportunity is an essential component of American society. However, statistical evidence demonstrates that it cannot exist unless the obstacles created by economic disadvantage are addressed and remedied. Likewise, our rapid advancement in the Information Age requires, more than ever, that individuals have an adequate education in order to obtain economic mobility. Therefore, equal opportunity cannot exist until every individual is given the same prospect of receiving the higher education that

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168. Malamud, *supra* n. 2, at 1861.

169. Kahlenberg, *supra* n. 8, at 5.

could free them from the bonds of intergenerational economic disadvantage; and that can only be done once the intangible obstacles that person has overcome are recognized and recompensed.